Supreme Court, U.S.
FILED

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OFFICE

In The
Supreme Court of the United States

Cathleen and Robert Novak, PETITIONERS

v.

Tietlebaum, Braverman & Bourges, P.C

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

Robert and Cathleen Novak
Pro se
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Copiague, New York 11726
631.789.5400

February 28, 2004

QUESTIONS PRESENTED

1. Weather refusing to allow the appeal of a final order of the Bankruptcy Court one day late constitutes an abuse of discretion, when the court miss led the petitions to believe that it was filed timely.

2. Conflict between Bankruptcy Rule 9006 and Federal Rule of Civil Procedure 6, and how rule 9006 is a trap for the unwary pro se litigant.

3. How rule 9006 applies to a bankruptcy cased when the underlying case is closed having no effect on the administration of the case.

4. Upon a late filing of an Appeal to the Bankruptcy Court when does the time expire to object to that filing Did the lower abuse its discretion in not applying the excusable neglect standards this Court found in Pioneer Investment Services v. Brunswick Assoc., 507 U.S. 380.

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OPINIONS BELOW

The opinion of the District Court and Second Circuit Court of Appeals and the Decision of Motion for reconsideration and final judgment of the Bankruptcy Court below are unreported and is reprinted in the Appendix to the Petition for Certiorari. Pet. App. B1-3,C 1-3, D1-2 & E-1.

JURISDICTION

The Second Circuit Court of Appeals entered its judgment October 15, 2004; thereafter Petitioner filed a petition for rehearing, which was denied on December 1, 2004. This Court has jurisdiction under 28 U.S.C.

The present Petition for Writ of Certiorari is filed within 90 days of the denial of Petition for Rehearing by the Second Circuit and is timely pursuant to 28 U.S.C. §§1257 and 2101(c) and Rule 10(1)(c) of the Rules for the U.S. Supreme Court.

STATEMENT OF THE CASE

This Appeal must be governed by the Bankruptcy Act, as it was in effect at the time of the filing of the Bankruptcy petition in August 1993

The filing of a voluntary joint Chapter 7 petition by the Appellants, on August 25, 1993, commenced the underlying bankruptcy proceeding. The petition was filed *pro se*.

Thereafter, the same case was converted to Chapter 11 by Order entered on January 18, 1996.

By Order dated June 12, 1996, the Appellants retained the law firm of Teitelbaum, Braverman & Borges, P.C. (TBB) as their counsel. It was agreed that the cost of such representation would be $10,000.

By Order dated December 30, 1996, a Chapter 11 Plan of Reorganization was confirmed. TBB was to file a final decree within 180 days. TBB failed to do so until January 1999.

At that same time in 1999, TBB filed an application for the allowance of fees and expenses for services rendered by it as counsel to the Appellants. The amount of the fees and expenses requested in such application was 46,000; way above what the Novak's and TTB had agreed to initially, when the Novak's retained TTB for representation during the proceedings set forth above, i.e. $10,000. Accordingly, the Novaks filed an objection to the application. After a hearing held on January 26, 1999, in response to the Novak's objection, the Bankruptcy Judge, Francis G. Conrad, reduced the fees and expenses to TBB slightly in an amount of approximately $43,000; nowhere near the $10,000 fee originally quoted.

The Bankruptcy Court Judge Conrad issued his decision reducing the fees and expenses, directly from the bench and officially closed the case, signing a final decree. As a result, the Novak's (*pro-se*) had the knowledge of Judge Conrad's decision and final decree immediately. Accordingly they were capable and did file an appeal from Judge Conrad's January 26, 1999 Order, almost immediately, on February 5, 1999. The appeal was granted, by Order of Judge Gershon on June 5, 2001. Further, the Hon. Nina Gershon remanded the proceeding to Bankruptcy Court for further hearings.

After a hearing on the remand held on September 13, 2002 before the Hon. Stan Bernstein, United States Bankruptcy Judge, Judge Bernstein issued a Memorandum of Decision and Order Allowing Final Application for Compensation of Debtors' Counsel in Part for $27,000 and allowing Reimbursable Expenses of $1,000. However, unlike Judge Conrad, Judge Bernstein did not issue his decision from the bench. He reserved decision on September 13, 2002 and did not issue his final decision until October 29, 2002; more than four weeks later.

During those four weeks, while awaiting for Judge Bernstein's decision, the Novaks made numerous inquiries into the status of the decision both telephonically and in person, to the Clerk of the Bankruptcy Court, where they had

occasion to speak to Judge Bernstein's law clerk. It was not until Wednesday November 6, 2002 that the Novaks finally received a copy of the decision via first class mail.

Next day, on Thursday November 7, 2002, the Novaks, specifically Bob Novak, went to the Bankruptcy Court to review the file and look for the exact date of entry of Judge Bernstein's decision. When he arrived the clerk informed him that the file was not available, it was in Judge Bernstein's chambers, and if he still wanted to see the file he had to contact Judge Bernstein's chambers directly informed him. Bob Novak did on the same day, but was unable to get through. The next day, on Friday at 3:40 PM, November 8, 2002, chambers called Novak and informed him that the file was on the way back to the clerk's office. Consequently, Bob Novak never saw the file the clerk, would not allow any file to be accessed after 4:00 PM, nor could I get from Riverhead to Central Islip in less than 45 minutes, and never confirmed the exact date of entry of Judge Bernstein's Decision by the Clerk's Office, which was to be stamped directly on the Decision and Final Order. Incidentally, when Bob Novak finally secured a copy of the Decision and Final Decree for purposes of the present appeal, he determined that, in fact, it has never been stamped with the Official Date of Entry of Judgment. Consequently, the Novaks really did not have any

knowledge of when the time would begin running for purposes of filing their appeal.

Nonetheless, without confirming the exact date of final entry, and without being informed either by the Clerk of the Bankruptcy Court, the Novaks filed their Notice of Appeal on Tuesday, November 12, 2002. Even if they had wanted to do so sooner, they were prevented to do so by two important events: (a) the Clerk of the Court's inability to confirm the Entry of Judge Bernstein's decision and (b) the fact that November 9, 2002 was a Saturday, November 10, 2002 was a Sunday, and Monday November 11, 2002 was Veteran's Day, a Federal Holiday. Even if they had wanted to get to the Court to file during these three days, they could not by virtue of the fact that the Court was closed. Finally, it was the Novak's belief, based on their experience with Federal Rules of Civil Procedure that in accordance Fed. R. Civ. P. 6 the appeal was more than timely, if filed on the 12th of November.

Both the Order and the Memorandum of Decision were entered on the docket by the Clerk of the Bankruptcy Court on October 29, 2002.

On November 12, 2002, Appellants filed a Notice of Appeal from the Order, dated November 12.

On November 14, 2002 Notice to parties concerning appeal.

See Pet. App. 1a-2a

On November 18, 2002 Designation of Record on appeal and Statement of issues filed by Appellants.

On November 26, 2002, letter by Appellee's and Appellee's designation of record.

On November 26, 2002,Appelants amended and supplemental Designation.

On December 10, 2002, Transmittal of Record by US Bankruptcy Court to the District Court.

On December 11, 2002, Motion by Appellee for dismissal of the Novak's' appeal filed on November 12, 2002 on the basis that such appeal was not timely, and therefore, in violation of F.R.B.P. 8002 and 9006.

On December 16, Motion for Extension of time to file transcript by Appellant.

On December 19, 2002 NOTICE issued by Deputy Clerk of the District Court, pursuant to Rule 8007 an Appeal was filed.

On December 23, 2002, Novak's Opposition to Appellee's motion was filed.

On June 19, 2003, Hon. Nina Gershon issued her Order granting Appellee's Motion and dismissing the Novak's' appeal.

On July 7, 2003, the Novak's filed a letter Motion for reconsideration.

On July 31, 2003, the Hon. Judge Nina Gershon denied Appellants' letter Motion for Reconsideration.

On August 7, 2003, the Hon. Judge Nina Gershon issued a Memorandum dismissing the Chapter 11 case and denying the Debtors' Motion for Reconsideration.

A Notice of Appeal filed was filed one day late (a) the foregoing events constitute "excusable neglect" and (b) public policy demands it.

In Pioneer Investment Services v. Brunswick Assoc., 507 U.S. 380. the Supreme Court has stated that excusable neglect is an "elastic concept" and is not limited to situations in which the failure to timely file is due to circumstances beyond the control of the filer. Furthermore, excusable neglect at bottom is an equitable consideration "taking account of all relevant circumstances surrounding the party's omission". Such circumstances include the danger of prejudice to the appellants, the length of delay and the impact on the judicial proceedings, did the appellants act in good faith, and the reason for the delay.

1. The danger of prejudice to the Novaks. – Dismissal of the appeal will prejudice the Novaks severely. Should this

Honorable Court choose to uphold the Court below, the Novaks will be forced to remit on a Judgment, which will be totally contradictory to their agreement with the TBB firm that the TBB's representation of the Novaks would not cost the Novaks more than ten thousand dollars. Accordingly, the Novaks will be severely prejudiced.

2. The length of delay and impact on the judicial proceedings. Petitioners were late unintentionally, by only one day. But more importantly, there will be no impact on the judicial proceedings whatsoever. The issue of TBB's fees and all the disputes and events following TTB's application for professional fees has nothing to do with the administration of the Bankruptcy proceedings due to the fact that all creditors were paid in 1996, and Bankruptcy Judge Conrad's order of 1999 officially closed the case. Therefore, there are no administrative matters or judicial proceedings, which this Appeal or the Appeal in the District Court below can interfere with. Furthermore, none of the parties to the Bankruptcy, i.e., the creditors or the Trustee can be affected by this appeal in any way.

3. Did the Novaks act in good faith. The Novaks absolutely acted in good faith. As set forth above, it was not until Wednesday, November 6, 2002 ,that the Novaks finally received a copy of the decision via first class mail.

Next day, on Thursday November 7, 2002, the Novaks, specifically Bob Novak, went to the Bankruptcy Court to review the file and look for the exact date of entry of Judge Bernstein's decision. When he arrived, he was informed by the clerk that the file was not available, it must be in chambers, and if he still wanted to see the file he had to contact Judge Bernstein's chambers directly. Bob Novak did on the same day, but was unable to get through. The next day, on Friday, November 8, 2002, chambers called Novak and informed him that the file was on the way back to the clerk's office. Consequently, Bob Novak never saw the file and never confirmed the exact date of entry of Judge Bernstein's Decision by the Clerk's Office, which was to be stamped directly on the Decision and Final Order. Incidentally, when Bob Novak finally secured a copy of the Decision and Final Decree for purposes of the present appeal, he determined that, in fact, it has never been stamped with the Official Date of Entry of Judgment. Consequently, the Novaks really did not have any knowledge of when the time would begin running for purposes of filing their appeal.

Nonetheless, without confirming the date of final entry, and without being informed either by the Clerk of the Bankruptcy Court, or via a reading of the bankruptcy rules of procedure, the Novaks filed their Notice of Appeal on Tuesday, November 12, 2002. Even if they had wanted to do

so sooner, they were prevented to do so by two important events: (a) the Clerk of the Court's inability to confirm the Entry of Judge Bernstein's decision and (b) the fact that November 9, 2002 was a Saturday, November 10, 2002 was a Sunday, and Monday November 11. 2002 was Veteran's Day, a Federal Holiday. Even if they had wanted to get to the Court to file during these three days, they could not, by virtue of the fact that the Court was closed. Finally, it was the Novak's belief, based on their experience with Federal Rules of Civil Procedure that in accordance Fed. R. Civ. P. 6 the appeal was more than timely, if filed on the 12th of November.

Consequently, not only have the Novaks acted in good faith, but nothing in their actions from the very beginning was done to somehow affect or prejudice the proceedings or the creditors or the trustee in the matter.

4. The reason for the delay. As can be seen from above, in Robert Novak's mind, he did not delay at all when he filed his Notice of Appeal on November 12, 2003. Furthermore, he was convinced that, in accordance Fed. R. Civ. P. 6, he was in fact on time.

Robert Novak is dealing with all matters since confirmation in December 1996, pro se. Also, since that time, he has been the plaintiff in EDNY on several cases involving his trademark infringements in CV 01-1518, 01-3566, 02-

2978 and 02-5164 before the Honorable Federal District Judge D. Hurley and the Honorable Magistrate Judge W. Wall. Dealing with about twenty defendants there have been many times when ten day time limitations for certain actions to be taken by him or others was computed. In so doing ,he referred to FRCP Rule 6a, which states:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a Legal Holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and Legal Holidays shall be excluded in the computation."

He has referenced the ten-day rule enough times to say he knows it by heart. Petitioner had no idea the Bankruptcy Court had different rules for computation of time. After all it was Federal Court, in the same building! Judge Wall and

Judge Bernstein are both on the 8th floor. Apparently, other Courts find this differential treatment of time perplexing. As one Court noted in pertinent part;

The District Court held that Robert Novak is well versed in the Bankruptcy Court's rules and procedures. Pet App. 2b. Petitioners pro se filed only one, not four Bankruptcies, this one. The appeal was again, in this case, however the court handed a written order to the petitioners from the bench.

"There is an extra dimension to "excusable neglect" analysis in bankruptcy appeals that warrants caution when applying "excusable neglect" analysis from other contexts. ... Pioneer excusable neglect analysis through the prism of the differences between Federal Rule of Appellate Procedure 4(a) and Federal Rule of Bankruptcy Procedure 8002.
When those two rules are compared, it becomes apparent that the time for filing an appeal -- 10 calendar days, subject to a 20-day extension for excusable neglect -- is an inflexible trap for the unwary that, in the interests of justice, warrants a generous construction of excusable neglect.
Under Appellate Rule 4(a)(1), a litigant in district court has 30 days in which to file a notice of appeal. Under Bankruptcy Rule 8002(a), a bankruptcy litigant has 10 days. Moreover, 10 days in bankruptcy means 10 calendar days. Fed. R. Bankr. P. 9006(a).

In contrast, in general federal practice in the district courts, 10 days means 10 non-holiday weekdays, which is never less than 14 calendar days. Fed. R. Civ. P. 6(a).

Under Appellate Rule 4(a)(5), the initial 30 days may be extended an additional 30 days in a motion made after expiration of the deadline upon a showing of either "excusable neglect" or "good cause." In contrast, under Bankruptcy Rule 8002(c)(2), the initial 10 days can be extended for 20 days in a motion made after expiration of the deadline only upon a showing of "excusable neglect". Fed. R. Bankr. P. 8002(c)(2).

Under Appellate Rule 4(a)(6), a party that did not receive notice of entry of the judgment is permitted an additional 14 days in which to file a notice of appeal within 180 days after entry of judgment so long as no party would be prejudiced. Fed. R. App. P. 4(a)(6). There is no bankruptcy analog.

It is difficult to justify many of these differences between the Bankruptcy Rules and the Civil and Criminal Rules for the garden-variety appeal. In view of the long time it generally takes to resolve bankruptcy appeals, these differences expose the Bankruptcy Rules to the criticism that they serve primarily as a barrier to entry to keep otherwise competent federal litigators out of the bankruptcy courts.

I would not exclude "good cause" as a basis (in addition to "excusable neglect") for extension of time because I cannot

differentiate between the garden-variety bankruptcy appeal and the garden-variety district court appeal.

For those who analogize judges to baseball umpires, I submit that the differences between the Appellate and Bankruptcy Rules require the bankruptcy judge to use a bigger strike zone for Bankruptcy Rule 8002(c) "excusable neglect" than the district judge, who also has the latitude of "good cause," needs for Appellate Rule 4(a)(5)(A)(ii) [or 4(b)(4)] "excusable neglect."

This should be even truer when the Court is dealing with a Pro Se litigant /Appellant.

Furthermore, a Court may extend the time for an appeal. Thus, even if the Notice of appeal was filed untimely by one day, it would still be timely for purposes of getting an Extension and excusable neglect exists because of the confusion of law on this issue and for good cause. Accordingly, the present Court does have the authority to and should extend Novaks' time to appeal. To find Robert Novak's confusion on the time computations did not constitute excusable neglect would be applying a very high standard of excusable neglect contrary to Pioneer.

A review of the chronological order of events described above in page three clearly shows that all other acts by the Novaks were preceding in the Appeal from November

14, 2002 thru December 19, 2002 no indication that the Appeal was untimely had been presented until Appellee's Motion. Had it been brought to the attention of the Novaks immediately, a motion to extend could have been filed under Rule 8002 as it was in effect in August 1993, the date governing this case. In the alternative the Notice of Appeal may have been taken as a motion to enlarge the time to appeal for excusable neglect.

II The present Court's decision to reverse the lower Court's decision to dismiss the Novaks' appeal will be consistent with the public policy and the legislative concerns behind Rules 8002 and 9006.

The draconian measures of Rules 8002 and 9006 were more likely than not, implemented for the sole purpose of preventing the disturbance of the administrative proceedings in ongoing, or pending bankruptcy matters, and avoiding the undue prejudicing of either the creditors, the estate or the Trustee in Bankruptcy. In the present matter, the case has been over since December 1996. Neither the administrative proceedings nor the creditors will be affected by the Court's decision to allow the Novaks to go forward with their appeal. Accordingly, such decision will be consistent with public

policy, and will be just and proper under the circumstances of this case.

III Should a pro se litigant receive latitude in the interpretation of the complex rules of bankruptcy.

In reviewing Pet.App.1a-2a, the Appeals Court of the Bankruptcy Court issued the "Notice To Parties Concerning Appeal". That notice
clearly stated that the court was cognizant of the order dated October 29, 2002, and the fact that the notice of appeal was filed on November 12, 2002. Petitioners proceeding pre se had to rely on the Appeal Clerk's notice that the appeal was filed timely. If it were not, why would the Court accept the appeal, and why would the Court not reject an untimely Notice of Appeal? The rules speak to the need for rapid administration of the case, not having any checks in place to alert the parties of a late filing of an appeal also delays the case. Thereafter, there were numerous filings and communications with the court and Appellee following the Notice of Appeal. It was not until December 23, 2002, that Appellee made a motion to the District Court to dismiss the appeal, as being filed untimely. Had the Bankruptcy Court, District Court, or Appellee notified petitioners in a reasonable time after filing its' notice of appeal, petitioners

would have had an opportunity to make a motion during the following 20 days after the initial 10 day period to file after the appeal had expired. Barring such notice should not preclude the filing of this appeal. As was found by this Court in Pioneer, there was confusing notice issued by the Clerk's Office in the instant case, petitioners urge this Court to find the timing of their receipt of the notice of Parties Concerning Appeal to be compelling evidence for a finding of excusable neglect and petitioners were entitled to proceed with an excusable neglect defense.

This Case Presents Issues Relating To the Unique Circumstance Doctrine. The conflict of Bankruptcy rule 9006 and Federal Rule of Civil Procedure 6(a), especially when the underlying cased was closed.

In reviewing the Advisory Committee notes to Rules 8002 and Rule 9006, the committee noted that Rule 9006 "A dangerous trap for practitioners not familiar with bankruptcy procedure is created by differences between Bankruptcy rule 9006(a) and Federal Rule of Civil Procedure 6(a). It was noted above that, if the period in question is eight days or more, intermediate Saturdays and Sundays are included in the count. Civil Rule 6(a), on the other hand, excludes intermediate Saturdays and Sundays

from the count when the period in question is 10 days or less."

If the Advisory Committee were astute enough to recognize that the rule was a trap for a petitioner experienced in Bankruptcy, it would be a tsunami for a *pro se* litigate.

The unique circumstance in this case for the court to consider is the following: The Chapter 11 case was confirmed and a Plan approved in December of 1996. A final decree closing the Bankruptcy Case was entered in February of 1999. All creditors were paid in full. In reviewing the 1989 Advisory Committee notes, the reason the 10-day time period was shortened to exclude weekends and Holiday, this was done in the "interest of a prompt administration of bankruptcy cases". At the time of this appeal, there was no bankruptcy case to administer and the filing of the appeal was within the 10-day time limit based on petitions computation, of the ten-day time period to file an appeal would extend to November 14th 2002. Based upon FRCP 6a. A quick read of the memorandum was confusing, believing we had the upcoming 3 day weekend to review the somewhat lengthy 38 page memorandum and ascertain if their were grounds for appeal. Petitioners calculated we had until the following Thursday, November 14, 2002.
Robert and Cathleen Novak were dealing with all matters

since conformation in December 1996, *pro se*. Also, since that time I have been the plaintiff in EDNY on several cases involving infringements to my trademark infringements in CV 01-1518, 01-3566, 02-2978 and 02-5164 before Judge D. Hurley and Judge W. Wall. Dealing with about twenty defendants there have been many times when ten day time limitations for certain actions to be taken by myself or others and was computed referring to FRCP Rule 6a.

"In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a Legal Holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and Legal Holidays shall be excluded in the computation."

I had referenced the ten-day rule enough times to say I knew it by heart. I had no idea the Bankruptcy Court had different rules for computation of time. After all it was Federal Court, in the same building! Judge Wall and Judge Bernstein are both on the 8th floor. Apparently other Courts found this differential treatment of time perplexing. As one Court noted in pertinent part;

"There is an extra dimension to "excusable neglect" analysis in bankruptcy appeals that warrants caution when applying "excusable neglect" analysis from other contexts. ... Pioneer excusable neglect analysis through the prism of the differences between Federal Rule of Appellate Procedure 4(a) and Federal Rule of Bankruptcy Procedure 8002.
When those two rules are compared, it becomes apparent that the time for filing an appeal -- 10 calendar days, subject to a 20-day extension for excusable neglect -- is an inflexible trap for the unwary that, in the interests of justice, warrants a generous construction of excusable neglect.
Under Appellate Rule 4(a)(1), a litigant in district court has 30 days in which to file a notice of appeal. Under Bankruptcy Rule 8002(a), a bankruptcy litigant has 10 days. Moreover, 10 days in bankruptcy means 10 calendar days. Fed. R. Bankr. P. 9006(a).
In contrast, in general federal practice in the district courts,

10 days means 10 non-holiday weekdays, which is never less than 14 calendar days. Fed. R. Civ. P. 6(a).

Under Appellate Rule 4(a)(5), the initial 30 days may be extended an additional 30 days in a motion made after expiration of the deadline upon a showing of either "excusable neglect" or "good cause." In contrast, under Bankruptcy Rule 8002(c)(2), the initial 10 days can be extended for 20 days in a motion made after expiration of the deadline only upon a showing of "excusable neglect". Fed. R. Bankr. P. 8002(c)(2).

Under Appellate Rule 4(a)(6), a party that did not receive notice of entry of the judgment is permitted an additional 14 days in which to file a notice of appeal within 180 days after entry of judgment so long as no party would be prejudiced. Fed. R. App. P. 4(a)(6). There is no bankruptcy analog.

It is difficult to justify many of these differences between the Bankruptcy Rules and the Civil and Criminal Rules for the garden-variety appeal. In view of the long time it generally takes to resolve bankruptcy appeals, these differences expose the Bankruptcy Rules to the criticism that they serve primarily as a barrier to entry to keep otherwise competent federal litigations out of the bankruptcy courts.

I would not exclude "good cause" as a basis (in addition to "excusable neglect") for extension of time because I cannot differentiate between the garden-variety bankruptcy appeal

and the garden-variety district court appeal.

For those who analogize judges to baseball umpires, I submit that the differences between the Appellate and Bankruptcy Rules require the bankruptcy judge to use a bigger strike zone for Bankruptcy Rule 8002(c) "excusable neglect" than the district judge, who also has the latitude of "good cause," needs for Appellate Rule 4(a)(5)(A)(ii) [or 4(b)(4)] "excusable neglect."

A Court may extend the time for an appeal. Even if the Notice of appeal was filed untimely by one day, excusable neglect exists because of the confusion of law on this issue. To find petitioner's confusion on the time computations did not constitute excusable neglect would be applying a very high standard of excusable neglect contrary to Pioneer. See Christopher v. Diamond Benefits life 35 FR 3rd 235. Further, we ask the Court to accord consideration based on the petitioner's lack of formal training and expertise in law.

The bankruptcy court inhibited access to the courts files by its failure to allow access to the files subsequent to November 12, 2002 filing of the Notice of Appeal. Also in provided misleading information in the Notice to parties concerning appeal, which apparently acknowledged that the

filing was filed correctly by the Clerk of appeals of the Bankruptcy Court. Pet. App. 1a-1-b.

Therefore, this case presents the unique circumstances of the Bankruptcy Court error in accepting the untimely filing; (i)its failure to notice the untimely filing. (ii) the fact that the case was closed having no effect on the administration of a pending bankruptcy. (iii) the issue of a pro se litigant proceeding in complex bankruptcy matters.

For the reasons cited here, Petitioner would urge this Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

Robert Novak

Cathleen Novak

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Appendix A

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

Case No.898-92318-288

Robert and Cathleen Novak,

Debtors Chapter 11

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NOTICE TO PARTIES CONCERNING APPEAL

A notice of appeal was filed int eh above case by Robert and Cathleen Novak on November 12,2002, from an order entered on October 29, 2002.

Please observe the following, pursuant to Bankruptcy Rules 8001,8004,and 8006, Local rules 8004-1 and 8007-1, and established local practice in the Bankruptcy Court and District Court:

1. Unless the appellant has already served notice of the notice of appeal (as evidenced by a certificate of service), the appellant must provide the Clerk with sufficient copies of the notice and address labels for all parties to be served.
2. Appellant's designation of record on appeal and statement of issues to be presented on appeal (original plus three copies) are due within ten (10) days of the date of filing the later of the following, as applicable: (a) the notice of appeal; (b) entry of an order granting leave to appeal; (b) entry of an order granting leave to appeal; or (c) entry of an order disposing of the last timely motion outstanding of a type specified in Bankruptcy Rule 8002(b). A copy of the designation and statement shall be served by the appellant on the Appellee.

3. Within ten (10) days after service of the appellant's designation and statement, the Appellee may file (original plus three copies) and serve on the appellant a designation of additional items to be included in the record on appeal.
4. Each party who has filed a designation must provide this office, in a timely fashion, with a copy of the items designated. Document numbers must be plainly visable on the copies submitted.
5. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost.

It is the duty of the parties to insure that the record on appeal is complete. An incomplete record will otherwise be transmitted, for disposal as the District Court shall determine. The deadline for transmission of the record will be set for thirty (30) days from the filing with the Court of the appellant's designation of record, or from the deadline for the said filing, whichever is earlier.

Dated: Central Islip, New York
November 4, 2002

FOR THE COURT

_____
Appeals Clerk

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

IN RE ROBERT NOVAK and
CATHLEEN NOVAK,

Appellants ORDER
02-CV-6459(NG)

TIETELBAUM,BRAVERMAN & BOURGES,P.C.
Appellee.

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GERSHON, United States District Judge:

Appellants Robert and Cathleen Novak appeal a final order of the Bankruptcy Court awarding fees $27,603.00 and reimbursable costs of $1,173.70 to their former counsel, Appellee Tietlebaum, Braverman & Bourges,P.C. Appellee now moves to dismiss on the ground that appellants failed to timely file their notice of appeal with the Bankruptcy Court. For the following reason, appellee's motion is granted.

Federal Rule of Bankruptcy Procedure 8002 (a) requires that a notice of appeal must be filed with the Clerk of the Bankruptcy Court "within 10 days of the date of the entry" of the order from which appeal is sought. Rule 9006(a) provides that both intermediate weekend days and legal holidays are included in the computation of that ten day period. The date of entry of the order is not counted, but the last day to be computed is.Ld. In this case, the date of entry of the order at issue was October 29, 2002. Therefore, pursuant to the Bankruptcy Court's procedural rules, appellants' last date for a timely filing, a notice of appeal was November 8, 2002. Appellants, although by their own admission aware of the order and its date of entry as of November 6, 2002, did not file their notice of appeal until November 12, 2002.

Appendix B

Federal Rule of Bankruptcy Procedure 8002©(2) contains provisions for requesting an extension of time in which to file a notice of appeal upon motion to the Bankruptcy Court. Any such request must be made by written motion "filed before the time for filing a notice of appeal may be granted upon a showing of excusable neglect." Ld. Appellants in this case, made no application to the Bankruptcy Court for any extension of time. Moreover, appellants' two arguments in favor of a finding of excusable neglect raised for the first time before this Court, are not well taken. First, appellants contend that the Clerk of the Bankruptcy Court could not have entered judgment on the same date as the order was signed and that, therefore, the date of the entry of October 29, 2002 should not be used in computing the time in which to file a timely notice of appeal. That argument is entirely without support. Second, appellants argue that their failure to timely file should be excused because Federal Rule of Civil Procedure 6(a) excludes "intermediate Saturdays, Sundays, and legal holidays" from computation when the period of time allowed is less than 11 days. That argument is also without merit. Appellants, although proceeding on this appeal pro se, are well-versed in the Bankruptcy Court's rules and procedures, having filed at least four previous bankruptcy applications and at least one previous Federal District Court appeal. Any claim of excusable neglect is rejected.

The ten day period for filing a notice of appeal is strictly construed. In re Abdallah,778 F.2d 75,77 (1stCir.1985), cert. Denied, 476 U.S. 1116 (1986); in re Northeast Management Serv.,Inc. v. City of Syracuse, 267 B.R. 492, 495 (N.D.N.Y. 2001). Failure to file a timely notice deprives federal courts of jurisdiction to review the Bankruptcy Court's order. In re Abdallah, 778 F.2d at

77; In re Northeast Management Serv.,Inc., 267 B.R. at 495, in re Satellite Systems Corp. v Togut, Segal & Segal, 73B.R. 610,611(S.D.N.Y.1987). Accordingly, appellee's motion is granted, appellants' appeal is dismissed, and the Clerk of Court is directed to close this case.

SO ORDERED.

NINA GERSHON
United States District Judge

Dated: Brooklyn, New York
June 19, 2003

Appendix C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER
THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECENDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 15th Day of October, two thousand and four.

PRESENT;
Hon. John M. Walker, Jr.,
Chief Judge,
Hon. Roger J. Miner,
Hon. Jose' A. Cabranes,
Circuit Judges.

----------x
IN RE ROBERT NOVAK and
CATHLEEN NOVAK,
Debtors
----------x
CATHLEEN NOVAK, ROBERT NOVAK
Debtors-Appellants
v.
TETELBAUM, BRAVERMAN & BORGES,P.C.
Appellee

Appendix C

----------x

FOR DEBTORS-APPELLANTS; Robert Novak and
Cathleen Novak
Pro se,Copiague,NY

FOR APPELLEE: WANDA BORGES,BORGES & Assoc. LLC, Syosset, NY (Richard Braverman, Braverman Law Office,P.C.,Uniondale,NY Of Counsel).

Appeal from the United States District Court for the Eastern District of New York (Nina Gershon, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Joint debtors-appellants Robert and Cathleen Novak appeal from the order of the United States District Court for the Eastern District of New York (Nina Gershon, Judge) dismissing as untimely the Novaks' appeal from the order of the United States Bankruptcy Court for the Eastern district of New York (Stan Bernstein, Bankruptcy Judge). We affirm.

The Novaks initiated the underlying bankruptcy case by filing a Voluntary joint Chapter 7 petition in 1993; the case was converted to Chapter 11 in 1996. The Appellee, Teitelbaum, Braverman & Borges,P.C.("TBB"),was appointed by court order on June 12, 1996, to represent the Novaks in connection with their Chapter 11 reorganization plan was confirmed. TBB subsequently applied to the bankruptcy court for an award of fees and costs, and on January 26,1999, after a contested hearing, the Bankruptcy Court issued a fee order awarding TBB slightly less money than it had requested. The Novaks appealed, and on June 5, 2001, Judge Gershon vacated the fee order and remanded the case to the

Bankruptcy Court for reconsideration. On remand, Judge Bernstein thoroughly reviewed the record and held an additional evidentiary hearing on September 13, 2002. On October 29, 2002, Judge Bernstein issued and entered an order awarding $27,603.00 in fees and $1,173.70 in costs. The Novaks now appeal this order.

Under Federal Rule of Bankruptcy Procedure 8002(a), a notice of appeal is untimely unless filed "within 10 days of the date of the entry of the judgment, in order, or decree appealed from." Thus, the Novaks faced a filing deadline, calculated in accordance with Federal Rules of Bankruptcy Procedure 8002(a) and 9006(a), of November 8,2002-four days too late. Although a Bankruptcy Court may extend the time for filing a notice of appeal if an extension is requested in accordance with Federal Rule of Bankruptcy Procedure 8002(c), the Novaks made no such request. Because the Novaks' notice of appeal was untimely, the District Court dismissed the appeal for want of jurisdiction. The District Court's decision, which we review de novo, was correct. See Montco, Inc. v. Barr (In re Emergency Beacon Corp.), 666F.2d 754,758 (2dCir. 1981) (recognizing that failure to file a timely notice of appeal deprives the District Court of Jurisdiction to hear a bankruptcy appeal) U.S. ex rel. McAllan v. City of New York, 248 F 3d 48, 54 (2d Cir. 2001) (recognizing that the filing deadlines must be enforced).

We have considered all of the Novaks' arguments and find them to be without merit.

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT;
Roseann B. MacKechnie, Clerk
By Lucille Carr, Deputy Clerk

Appendix D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Roseann B. Mackechnie
CLERK
Date: 1/29/04
Docket Number: 03-5070-bk
Short Title: In Re: Novak v. Teitelbaum,Braverma
DC Docket Number:
DC Judge:

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of NY, on 1st Day of December 2004.

Present: Hon. John M.Walker, Jr., Chief Judge
Hon. Roger J. Miner
Hon. Jose A. Cabranes
In Re: CATHLEEN NOVAK, ROBERT NOVAK
Debtors.

CATHLEEN NOVAK, ROBERT NOVAK
Debtors-Appellants,
v.

TEITELBAUM, BRAVERMAN & BORGES,P.C.
Appellee

A petition for panel rehearing having been filed herein by Robert and Cathleen Novak,
Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

2d
Appendix D

For the Court,
Roseann B. MacKechnie, Clerk
By:
Motion Staff Attorney

DEC 1-2004

Appendix E

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:

Robert and Cathleen Novak,	Case No.898-92318-288 Chapter 11
Debtors	

ORDER RE: FINAL COMPENSATION

A final hearing was held on September 13, 2002 for allowance of final compensation and expenses of the Chapter 11 debtors' counsel, Teitelbaum, Braverman & Borges, P.C. For the reasons stated in a Memorandum and Order Allowing Final Application for Compensation of Debtors' Counsel in Part and Allowing Reimbursable Expenses, issued and entered on the docket on October 29, 2002.

IT IS ORDERED that the final compensation for Teitelbaum, Braverman & Borges, P.C. is approved in the amount of $27,603, after crediting the retainer of $3,500, and its reimbursable costs are approved in the amount of $1,173.70.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order upon the debtors, Wanda Borges, Esq., and the offices of the United States trustee in Central Islip (attn: Terese Cavanagh, Esq.)

Central Islip, NY
October 29, 2002

Stan Bernstein
U.S. Bankruptcy Judge

FILED
JUN 7 - 2005
OFFICE OF THE CLERK

No. 04-1488

IN THE

Supreme Court of the United States

CATHLEEN and ROBERT NOVAK,

Petitioners,

v.

TEITELBAUM, BRAVERMAN & BORGES, P.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Counsel of Record
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QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK ABUSED ITS DISCRETION WHEN IT PROPERLY DECLINED TO CONSIDER PETITIONERS' APPEAL OF THE BANKRUPTCY COURT'S DECISION AND ORDER.

2. WHETHER THE UNITED STATES DISTRICT COURT SHOULD HAVE IGNORED PETITONERS' FAILURE TO PROPERLY READ RULE 9006 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AND GRANTED JURISDICTION TO PETITIONERS' UNTIMELY APPEAL OF THE BANKRUPTCY COURT'S DECISION AND ORDER.

3. WHETHER RULE 9006 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE APPLY TO A BANKRUPTCY CASE THAT PETITIONER ERRONEOUSLY STATES WAS CLOSED AT THE TIME.

4. WHETHER THE LOWER COURTS ABUSED THEIR DISCRETION IN REQUIRING AN ADHERENCE TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE IN DENYING PETITIONERS' CLAIMS OF EXCUSABLE NEGLECT.

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INTRODUCTION

The Petitioners, Robert and Cathleen Novak (hereinafter the "Novaks" or "Petitioners") ask this Court to grant their Petition for Writ of Certiorari and fail to present any issue warranting this Court's review. Each of the questions raised by the Petitioners' highlights Petitioners' failure to adhere to court rules and Petitioners' baseless desire to have the courts ignore Petitioners' disregard for the court rules.

First, the United States District Court for the Eastern District Court of New York dismissed the Novaks' appeal from the Bankruptcy Court Order ("Bernstein Decision" defined *supra*) in that the appeal was not timely filed in accordance with the Federal Rules of Bankruptcy Procedure (hereinafter "Bankruptcy Rules"), and the District Court, therefore, lacked jurisdiction to consider the Novaks' appeal.

Thereafter, the United States Court of Appeals for the Second Circuit affirmed the District Court order.

The Petition for a Writ of Certiorari fails to present any issue warranting this Court's review. As the decisions of the United States District Court and the Second Circuit Court of Appeals clearly reflect, the appropriate rules and caselaw have been applied. The United States District Court properly determined that it had no jurisdiction to hear an untimely appeal. The Court of Appeals for the Second Circuit properly affirmed the District Court's judgment. Thus, Respondent Teitelbaum, Braverman & Borges, P.C. asks this Court to deny the Novaks' Petition.

RELEVANT FACTUAL BACKGROUND

A. BANKRUPTCY CASE

On August 25, 1993, the Novaks, *pro se*, filed a voluntary joint Chapter 7 petition in the United States Bankruptcy Court for the Eastern District of New York. The case was converted to Chapter 11 by Order entered on January 18, 1996. By Order dated June 12, 1996, the Novaks retained the law firm of Teitelbaum, Braverman & Borges, P.C. (hereinafter "TBB" or "Respondent") as their counsel. On December 30, 1996, a Chapter 11 Plan of Reorganization was confirmed.

Thereafter, TBB filed an application for the allowance of fees and expenses for services rendered to the Novaks. An objection to the application was timely filed by the Novaks. After a hearing held on January 26, 1999, Bankruptcy Judge Francis G. Conrad awarded fees and expenses to TBB in an amount slightly less than requested.

On February 5, 1999, the Novaks appealed the Order allowing fees. By Order dated June 5, 2001, the Hon. Nina Gershon of the United States District Court for the Eastern District of New York granted the appeal and remanded the proceeding to the Bankruptcy Court for further hearings. Subsequently, Bankruptcy Judge Stan Bernstein issued a Memorandum of Decision and Order Allowing Final Application for Compensation of Debtors' Counsel in Part and Allowing Reimbursable Expenses (the "Bernstein Decision") on October 29, 2002. A separate Order Re: Final Compensation, which fixed the fees and expenses, was signed on the same date.

B. DISTRICT COURT RULINGS

On November 12, 2002, the Novaks filed a Notice of Appeal from the Bernstein Decision. On December 9, 2002, TBB filed a Motion to Dismiss the appeal on the grounds that the Novaks failed to timely file their Notice of Appeal from the Bernstein Decision, and the District Court, therefore, lacked jurisdiction to hear said appeal. By Order dated June 19, 2003, United States District Court Judge Nina Gershon, granted TBB's motion and dismissed the Novaks' appeal.

On July 8, 2003, the Novaks filed a "Motion to Re-hearing Arguments on Appeal," requesting that Judge Gershon rehear the Novaks' arguments. On July 31, 2003, Judge Gershon denied the Novaks' Motion to Rehear in a one-paragraph Order of the Court.

C. COURT OF APPEALS RULINGS

On August 14, 2003, the Novaks filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit. The Second Circuit Court of Appeals affirmed the judgment of the district court dismissing, as untimely, the Novaks' appeal from the Bernstein Decision. Thereafter, the Novaks filed a Motion to Rehear and that Motion was denied as well.

REASONS FOR DENYING THE PETITION

A. PETITIONERS' ORIGINAL APPEAL FROM THE BANKRUPTCY COURT DECISION WAS UNTIMELY, FAILING TO ADHERE TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

On November 12, 2002, the Novaks' appealed from the Bernstein Decision dated October 29, 2002. Bankruptcy Rule 8002(a) requires that an appeal be filed "within 10 days from the date of the entry of the judgment, order, or decree appealed from." Bankruptcy Rule 9006(a) explains that when computing a period of time allowed by the rules, the day on which the event occurs (i.e. entry of the order) is not counted, but the last day of the period to be computed is counted. Further, Bankruptcy Rule 9006(a) provides that weekends and holidays are included as part of the calculation of ten days. Thus, the time to appeal the October 29, 2002 order expired on Friday, November 8, 2002. Consequently, the appeal filed on November 12, 2002 was untimely. In addition, the Novaks did not file a motion or application to extend the deadline to appeal, as they could have done under Bankruptcy Rule 8002(b) and (c).

The United States District Court for the Eastern District of New York denied the Novaks' appeal as untimely. As stated in the *Matter of Ramsey*, "[a]n untimely notice deprives the district court of jurisdiction to review the bankruptcy court's order or judgment." *Ramsey* at 612 F.2d 1220, 1222 (9th Cir. 1980) (relying on *Matter of Estate of Butler's Tire & Battery Co., Inc.*, 592 F.2d 1028, 1034 (9th Cir. 1979); *In re W. T. Grant Co.*, 425 F. Supp. 565, 567 (S.D.N.Y. 1976), *aff'd*

without opinion; *Berger v. Rodman*, 559 F.2d 1202, 1206 (2d Cir. 1977)).

Then, when the Novaks' filed an appeal of the United States District Court Order with the United States Court of Appeals for the Second Circuit, the Second Circuit affirmed the judgment of the district court dismissing as untimely the Novaks' appeal of the Bernstein Decision.

This jurisdictional defect barring appellate review has been visited by many courts, and the decisions are consistent that failure to file a timely notice of appeal bars the appellate court from hearing the matter. *See In re Satellite Sys. Corp.*, 73 B.R. 610 (S.D.N.Y. 1987). *See also In re Delta Eng'g Int'l, Inc.*, 270 F.3d 584 (8th Cir. 2001); *Matter of Fellows*, 19 F.3d 245 (5th Cir. 1994); *Matter of Schultz Mfg. Fabricating Co.*, 956 F.2d 686 (7th Cir. 1992); *In re Sousa*, 795 F.2d 855 (9th Cir. 1986).

B. PETITIONERS' ARGUMENT IS BASED ON A MISAPPLICATION OF A CLEARLY-STATED FEDERAL RULE OF BANKRUPTCY PROCEDURE

There is no conflict between Bankruptcy Rule 9006 and Rule 6 of the Federal Rules of Civil Procedure (hereinafter "FRCP"). The Bankruptcy Rules "govern procedure in cases under Title 11 of the United States Code." FED. R. BANKR. P. 1001. Bankruptcy Courts are specialized courts established to hear bankruptcy matters under 28 U.S.C. § 157. In contrast, the FRCP "govern the procedure in the United States district courts in all suits of civil nature . . ." FED. R. CIV. P. 1. Thus, a different set of rules apply depending on the court hearing

the matter. Petitioners cannot argue that the Bankruptcy Rules conflict with the FRCP because the FRCP never apply to an appeal from a Bankruptcy Court order. Petitioners merely chose to misapply the wrong set of rules.

Judge Gershon, in her June 19, 2003 Order, stated that the Novaks "although proceeding on this appeal *pro se*, are well-versed in the Bankruptcy Court's rules and procedures, having filed at least four previous bankruptcy applications and at least one previous federal district court appeal." This Court should not grant Petitioners' writ of certiorari for the simple reason that they misapplied a clearly-stated Bankruptcy Rule and should have known better.

C. THE "EXCUSABLE NEGLECT" STANDARD HAS NOT BEEN MET IN THIS INSTANCE

The Novaks cannot show excusable neglect for their failure to timely file their Notice of Appeal dated November 12, 2002. Bankruptcy Rule 8002(c) allows for an extension of time to file a notice of appeal when there is excusable neglect and when the request for an extension has been made in writing within twenty days after the expiration of the time to file the notice. The Novaks did not make a request for an extension of time. Thus, an exception for excusable neglect does not apply in this case and does not change the determination that the November 12, 2002 Notice of Appeal was untimely filed.

Chief Judge Michael B. Mukasey of the United States District Court for the Southern District Court of New York confirmed that "at least three different courts have held, under nearly identical circumstances, that when a litigant misses the deadline in which to file a bankruptcy appeal because he

relies on FED. R. CIV. P. 6(a) instead of FED. R. BANKR. P. 9006(a), there is no excusable neglect." *In re Singer Co. N.V., et al.*, 2002 WL 10452, *3 (2002) (citing *HML II, Inc. v. Ginley (In re HML II, Inc.)*, 234 B.R. 67, 71-73 (B.A.P. 6th Cir. 1999); *Hartford Cas. Ins. Co. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 214 B.R. 197, 200-01 (B.A.P. 8th Cir. 1997); *Auto Specialties Mfg. Co. v. Sachs (In re Auto Specialties Mfg. Co.)*, 133 B.R. 384, 391-92 (Bankr. W.D. Mich. 1991)).

Moreover, the lower courts' refusal to consider Bankruptcy Rule 8002(c) and apply excusable neglect in the cases relied on in the *Singer* case was not an abuse of their discretion because the lower courts followed clearly-stated Bankruptcy Rules in reaching their decisions. In the Novaks' case, Petitioners never made a written request for an extension of time to file a notice of appeal. In fact, Petitioners' argument, that the lower courts abused their discretion in issuing their decisions, is nothing more than a bald assertion.

The Novaks erroneously rely on *Pioneer Investment Services v. Brunswick Assoc.*, 113 S. Ct 1489 (1993) to convince this Court to grant their Petition. The circumstances in *Pioneer* bear no semblance to the facts in the Novaks' matter. In *Pioneer* this Court determined that the actions of counsel for a creditor, coupled with an ambiguous notice of a bar date, together with the innocence of that unsecured creditor in its reliance on its counsel's advice, were sufficient bases on which to find that the creditor missed the deadline due to "excusable neglect."

Further, a simple reading of Bankruptcy Rule 9006(b), which permits the enlargement of time after that time has

passed, notes that the enlargement of time is limited under Rule 8002. The enlargement of time within which to file an appeal from a Bankruptcy Court order under Bankruptcy Rule 8002(c)(2) may be granted only when a motion to extend that time is filed "not later than 20 days after the expiration of the time for filing a notice of appeal . . . upon a showing of excusable neglect."

The Novaks never filed a motion to enlarge their time to appeal the Bernstein Decision and have failed to show any excusable neglect either as to their failure to timely file or their failure to timely file a motion to enlarge their time to appeal.

CONCLUSION

For these reasons, the Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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